

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 7219 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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EXECUTIVE ENGINEER NARMADA PROJECT MAIN CANAL -
Petitioner(s)

Versus

VINODCHANDRA C DARJI - Respondent(s)

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Appearance :

NANAVATI & NANAVATI for Petitioner(s) : 1,
MR YOGESH S LAKHANI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 17/06/2006

ORAL JUDGMENT

Heard learned advocate Mr.D.J.Shukla
appearing for Nanavati & Nanavati on behalf of

petitioner. The learned advocate Mr.Murli Devnani appearing for learned advocate Mr.Y.S.Lakhani on behalf of respondent.

In the present petition, the petitioner-employer has challenged the award passed by Labour Court, Nadiad in reference Case No.344 of 1991, dated 05.07.1995. The Labour Court has set aside the termination order and granted reinstatement with continuity of service with full back wages of interim period.

This Court has passed following order dated 6th October, 1995 :-

Rule returnable by 7th November, 1995. In the meanwhile, operation of the award dated 5th July, 1995 shall remain stayed subject to the provisions of Section 17(B) of the Industrial Disputes Act. Direct service is permitted.

The stay granted by this Court subject to compliance of 17(B) during the interim period, workman has received wages under Section 17(B) of Industrial Disputes Act, 1947. Learned advocate

Mr.Shukla submitted that the respondent-workman was appointed temporarily, ad-hoc as per requirement without following due process of recruitment rules from 3rd January, 1985 by order dated 3rd January, 1985 with effect from 13th December, 1984. Thereafter, periodically, as per requirement, 29 days order was issued in his favour on the basis of application submitted by concerned workman. The respondent-workman was appointed on the post of Peon and he remain continued as per periodical orders upto 27th September, 1985. The learned advocate Mr.Shukla submitted that his last order of appointment for a period of 29 days and after completion of the said period, his service came to be terminated. Therefore, petitioner is not supposed to comply the provision of Section 25F of Industrial Disputes Act, 1947. He also submitted that Labour Court has committed gross error in granting reinstatement to such employee, who was not recruited as per rules. He also submitted that in place of respondent regular candidate can be appointed. Therefore, provisions of Industrial

Disputes Act is not violated by the petitioner. The learned advocate Mr.Shukla also submitted that workman has made clear statement on oath that he has not made any efforts during the interim period. Therefore, Labour Court has committed gross error in granting full back wages of interim period. He submitted that burden is upon workman to prove unemployment / or not gainfully employed. He also submitted that Labour Court has not given any reason or discussed the question in the award. However, Labour Court has granted 100% back wages of interim period i.e. more than 10 years. The learned advocate Mr.Shukla also submitted that less than 1 year service of workman, the Labour Court has granted the salary of more than 10 years. Therefore, Labour Court has committed gross error which requires interference by this Court.

The learned advocate Mr.Devnani on behalf of the respondent-workman has submitted that in response to application, the workman was

appointed in the pay-scale for a period of 29 days and remain continued with effect from 13th December, 1984 to 27th September, 1985 with artificial break given by petitioner with a view to that, workman may not get any better service benefit and therefore such type of appointment is arbitrary and just to deny the legitimate safeguard and right to the workman.

This might have adopted by petitioner, therefore, it amounts to unfair labour practice. Mr.Devnani also submitted that workman was working in the post of Peon. He remained out of job for more than 21 years and therefore left the question in respect of back wages on the discretion of the Court and submitted that Court may consider to pass appropriate orders.

Learned advocate Mr.Devnani also submitted that during the service workman had completed 258 days continuance service under Section 25B of sub Section 2 of the Industrial Disputes Act, 1947.

He submitted that once the workman has completed 240 days continuance service within a meaning of Section 25B of sub Section 2, then he is entitled to the benefit of Section 25F of Industrial Disputes Act, 1947. He submitted that undisputedly Section 25F has been violated by the petitioner, which render the order of termination as ab-initio void. In such circumstances, the Labour Court should have to restore the position whereas order in question is bad in law. He also submitted that petitioner has not proved gainful employment though the workman has stated that he has not made any efforts to find out the jobs. Therefore, an inference must be drawn in favour of workman that he remain unemployed.

I have considered the submissions made by both the learned advocates and I perused the award in question. Almost all factual aspects are not in dispute between the parties and identical orders of appointment were issued for specified period. The working days 258 has been completed

by the workman during this period from 13th December, 1984, to 27th September, 1985. Non compliance of Section 25F is also not disputed. Now, only question is required to be examined by this Court that 1 or 2 days break or gap which has been given by the petitioner whether it is arbitrary or not or amounts to unfair labour practice or not.

It is necessary to note that each 1 and 2 days, gap or break, what is the purpose behind. Is there really work was not available whether it was the case of petitioner that due to non availability of work and gap was given to the workman. These are the questions have not been justified by the petitioner before the Labour Court. Now, the workman has given application each month but periodical order has been passed subsequent to the continue of the workman meaning thereby such type of practice has been adopted by the petitioner with a view to deny the legal benefit to the workman for which he is entitled

under the provisions of Industrial Disputes Act, 1947. Therefore, unexplained gap or break given by petitioner to presume that such gap or break is arbitrary and amounts to unfair labour practice.

If such gap is remained as it is, then such gap can not consider the break in service of 240 days during the period of 13 December, 1984 to 27th September, 1985. Therefore, otherwise also this 1 or 2 days gap can not break the continuity of service of the workman for completion of 240 days continuous of service. Therefore, once the workman remained in service with gap of 1 or 2 days in continuous service and completed 240 days service, the workman is entitled the benefits of Section 25F of the I.D.Act, 1947.

This aspect of periodical appointments has examined by Madras Division Bench in case of Manager (P & A), Oil and Natural Gas Corporation

Ltd., Chennai Vs. G.Radhakrishnan reported in Labour Law Journal Vol.3, 2005 , Page No.324. The relevant para 22 is quoted as under :-

The above referred to decisions on interpretation of Section 2(oo)(bb) explain the legal position to the effect that a claim of an employer on a term based employee providing for automatic termination whether within the terms fixed or on expiry of the said term, cannot be taken for granted to sustain the order of termination. On a plain reading of Section 2(oo)(bb), it is quite clear that such term based employment would fall outside the scope of 'retrenchment' so long as the requirement of such fixed period of employment was bona fide required by the employer. It was, therefore, repeatedly pointed out that such excepted categories required a rigorous test rather than accepting the plea of employer on its face value or otherwise it would cause serious prejudice to an employee, who can be taken for a ride by unscrupulous employers by contending that the term of employment was for specific period though as a matter of fact such period of employment lasted quite for a long spell. In other words even though the requirement of employment was perennial by adopting the methodology of employing a person for a specific period, as many a time, an unscrupulous employer can always resort to abusing the provision contained in Section 2(oo)(bb) to thwart the other statutory protection available to an employee under Section 2(oo), namely, in the case of 'retrenchment' vis-a-vis the consequential benefits contained under Section 25-F of the Industrial Disputes Act. Therefore, when such extraordinary circumstances are brought out in the matter of employment and termination is resorted to by taking umbrage under Section

2(oo)(bb) of the Industrial Disputes Act, in the interest of Justice, we are of the view that a close scrutiny, of the real position will have to be necessarily made to rule out the possibility of any injustice being caused to an employee. It cannot be lost sight of that Section 2(oo)(bb) is specifically meant to cover only such employment which would be needed for an employer for a specific period alone and beyond which the requirement will not be there and even on such occasions, the employer should not be put into an unnecessary predicament of facing the other consequences that would normally occur while resorting to retrenchment. The benefit of the said exception will have to be strictly restricted to such specific situations alone and the same cannot be allowed to be misused or abused by the employers even in regard to cases where the nature and requirement of employment is perennial.

Once the workman remained in service with a gap of 1 or 2 days and completed 240 days working with continuous his service covered by definition of Section 25B of Sub Section 2 of Industrial Disputes Act, 1947. Therefore, the workman has justified that he rendered continuous service with the petitioner and completed 240 days working. In light of this non compliance of Section 25F rendered order of termination void ab-initio and therefore, according to my opinion,

Labour Court has rightly granted reinstatement with continuity of service to the workman. For that, Labour Court has not committed any error, which require interference by this Court.

Now, I examine the question of full back wages, which has been granted by Labour Court.

The workman has deposed before the Labour Court vide Exh.12 in chief examination, he made statement that at present I am unemployed though he has made efforts to find out jobs but in cross-examination, he specifically made it clear that I have not made any efforts to find out job elsewhere. Therefore, it is necessary to note one important aspect that reference made by appropriate Government on 22nd June, 1988 and first time after a period of 5 years from the date of reference, the workman has given evidence before the Labour Court. So, upto 5 years period, he remained silent and not gave any evidence before the Labour Court. In reference, first

evidence must have to be led by the workman and then it is burden upon employer to lead evidence.

If the workman has not made any efforts to find out the job and if, he really unemployed, then it may not be correct. During interim period workman must have to make efforts to find out job. Therefore, such contradictory evidence in cross examination such as that the workman may not remain unemployed.

However, apart from that burden upon the workman to prove unemployment as per decision of Apex Court in case of Municipal Council, Sujapur V/s. Surinder Kumar reported in 2006 5 Scale page 505 dated 05.05.2006 paragraph 13 is quoted as under :

Equally, well settled is the principle that the burden of proof, having regard to the principles analogous to Section 106 of the Evidence Act that he was not gainfully employed, was on the workman. (See Manager, Reserve Bank of India, Bangalore V/s.S.Mani & Ors. (2005) 5 SCC, 100).

Therefore, it being one aspect that workman has not fully proved unemployment for interim period. The Labour Court has taken into account the cross examination of the workman, even though Labour Court has granted full back wages of interim period of more than 10 years without giving any reason in support of its conclusion. The Labour Court has not discussed this issue at all. That once the termination is held to be illegal then Labour Court should have to consider independent question whether workman is entitled the amount of back wages for interim period or not ? Second issue is totally ignored by the Labour Court and not discussed the same. The Labour Court without giving reasons granted full back wages of interim period. It is not normal and ordinary to grant full back wages in case when termination order is set aside. The Court should have to consider the fact what was the length of the service of the workman, what was the status of the workman and what is the period for which workman remain unemployed and who is employer whether he is public body or not. These

are the relevant considerations while deciding the question of back wages, which has been totally ignored by the Labour Court, and not discussed by giving any reasons in support of his conclusion. Therefore, according to my opinion, the direction issued by the Labour Court granting full back wages of the interim period without reason and discussion is required to be quashed and set aside.

In view of the above observation, the award passed by the Labour Court in reference No.344/91 dated 5th July, 1995 is modified to that extent while confirming reinstatement with continuity of service that workman is entitled reinstatement with continuity of service and direction in respect to grant full back wages for the interim period is hereby quashed and set aside. Accordingly, present petition is partly allowed. Rule made absolute to that extent.

Considering the peculiar facts of this case

that service of the workman was terminated on 27th September, 1985 10 years period has been taken to decide reference, 11 years have taken by this Court to decide the petition, more than 21 years have passed till date, workman is remained without employment. This being hard reality and further workman should not have to suffer therefore, in the interest of justice, it is directed to the petitioner to reinstate the respondent workman with continuity of service without back wages of interim period within a period of 1 month from the date of receiving the copy of the said order.

However, it is made clear that case of continuity of service is granted to the workman. He is entitled to all other service benefits which did accrue in his favour by passage of time on the basis of various Government circulars, which implemented by petitioner in favour of other workmen, those who are in service.

(H.K.RATHOD, J.)

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